Supreme Court, U.S.
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No. 92-120

In The

Supreme Court of the United States

October Term, 1992

JOHN W. BANKS II,

Petitioner,

v.

VERNA J. BANKS,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeal For The Third Appellate District

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court has jurisdiction to review a question of state law as to the res judicata effect to be given to a state court judgment.

Whether this Court should review an unpublished state court decision that is of no precedential value and the facts of which are not likely to recur.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY AUTHORITY 3

28 U.S.C. § 1257(a) 3

Rule 2(a), California Rules of Court 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

REASONS FOR DENYING THE WRIT 9

I THIS COURT HAS NO JURISDICTION TO REVIEW THIS CASE SINCE NO FEDERAL QUESTIONS ARE RAISED 9

A. THIS COURT HAS NO JURISDICTION TO REVIEW STATE COURT DETERMINATIONS OF STATE LAW QUESTIONS, INCLUDING THE RES JUDICATA EFFECT OF A STATE COURT JUDGMENT 9

B. FEDERAL LAW PREEMPTS STATE COMMUNITY PROPERTY LAW, BUT DOES NOT DEPRIVE STATE COURTS OF JURISDICTION TO DIVIDE PROPERTY 15

C. THIS CASE INVOLVES NO ATTACHMENT, LEVY OR SEIZURE PROHIBITED BY 38 U.S.C. § 5301 19

II THIS COURT NEED NOT EXERCISE ITS DISCRETIONARY POWER TO REVIEW AN UNPUBLISHED DECISION WITH NO PRECEDENTIAL VALUE 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Adams v. Louisiana Bd. of Liquidation, 144 U.S. 651, 36 L.Ed. 578, 12 S.Ct. 756 (1892) 11

Beals v. Cone, 188 U.S. 184, 47 L.Ed. 435, 23 S.Ct. 275 (1903) 11

Casas v. Thompson, 42 Cal.3d 131, 720 P.2d 921, *cert. denied*, 479 U.S. 1012, 93 L.Ed.2d 713, 107 S.Ct. 659 (1986) 4, 22

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940) 14

Chouteau v. Maffit, 111 U.S. 200, 28 L.Ed. 400, 4 S.Ct. 340 (1884) 10

Estate of Gardiner, 45 Cal.App.2d 559, 114 P.2d 643 (1941) 13

Henn v. Henn, 26 Cal.3d 323, 605 P.2d 10 (1980) 4

Hicks v. Miranda, 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281 (1975) 22

Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control, 55 Cal.2d 728, 361 P.2d 712 (1961) 14

In re Marriage of Curtis, 7 Cal.App.4th 1, ___ Cal.Rptr. ___ (1992) 17

In re Marriage of Mansell, 217 Cal.App.3d 219, 265 Cal.Rptr. 227 (1989), *cert. denied sub nom. Mansell v. Mansell*, ___ U.S. ___, 112 L.Ed.2d 197, 111 S.Ct. 237 (1990) ..... *passim*

In re Marriage of Thomas, 156 Cal.App.3d 631, 203 Cal.Rptr. 58 (1984) 16

Mansell v. Mansell, 490 U.S. 581, 104 L.Ed.2d 675, 109 S.Ct. 2023 (1989) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

McCarty v. McCarty, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981) 5, 12, 17, 18

Moffat v. Moffat, 27 Cal.3d 645, 612 P.2d 967 (1980) 13

Northern Pac. R. Co. v. Ellis, 144 U.S. 458, 36 L.Ed. 504, 12 S.Ct. 724 (1892) 11

Pacific Mut. Life Ins. Co. v. McConnell, 44 Cal.2d 715, 285 P.2d 636 (1955), *appeal dism.* and *cert. denied*, 350 U.S. 852, 100 L.Ed.2d 852, 76 S.Ct. 472 (1956) 13

Rose v. Rose, 481 U.S. 619, 95 L.Ed.2d 599, 107 S.Ct. 2029 (1987) 20

San Francisco v. Itsell, 133 U.S. 65, 33 L.Ed. 570, 10 S.Ct. 241 (1890) 11

San Francisco v. Itsell, 80 Cal. 57, 22 P. 75 (1889), *appeal dism.* 133 U.S. 65, 33 L.Ed. 570, 10 S.Ct. 241 (1890) 11

Slater v. Blackwood, 15 Cal.3d 791, 543 P.2d 593 (1975) 14

Stoll v. Gottlieb, 305 U.S. 165, 83 L.Ed. 104, 59 S.Ct. 134 (1938) 14

Wissner v. Wissner, 338 U.S. 655, 94 L.Ed. 424, 70 S.Ct. 398 (1950) 20, 21

STATUTES

Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988) 9, 22

10 U.S.C. § 1408 ..... 2, 17, 18

28 U.S.C. § 1257 ..... 2, 3, 9, 19, 22

38 U.S.C. § 5301(a) 1, 2, 7, 8, 19, 20

TABLE OF AUTHORITIES - Continued

Page

California Code of Civil Procedure

§ 473 5

OTHER

California Rules of Court

Rule 2(a) 3

Rule 977(a) 22

David D. Siegel, *Commentary On 1988 Revision*, 28 U.S.C.A. § 1257 (West Supp. 1992) 23

Respondent Verna J. Banks respectfully submits this brief in opposition to the petition for writ of certiorari, which she received on July 17, 1992.

Petitioner is seeking review of a question of state law as to which this Court has no jurisdiction. *Mansell v. Mansell*, 490 U.S. 581, 586 n.5, 104 L.Ed.2d 675, 684 n.5, 109 S.Ct. 2023, 2027 n.5 (1989) (*Mansell I*). Based on California res judicata law, a state court denied petitioner's motion to set aside a 3½ year-old family law judgment, which had never been appealed. The state appellate court affirmed, and the California Supreme Court denied review.

Petitioner misstates the issues in this case in an attempt to support jurisdiction. He poses the question whether the anti-attachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301, preempts state court power. This issue is simply not present in this case.

Even if the Court were able to reach the substantive federal law issues petitioner seeks to raise, these issues are of no continuing import. The opinion below is unpublished and of no precedential value. This Court's decision in *Mansell I* now prevents states from treating military disability pay as community property. The unique facts of this case will not recur.

The Court should deny the certiorari petition without hesitation, just as it did in *In re Marriage of Mansell*, 217 Cal.App.3d 219, 265 Cal.Rptr. 227 (1989), *cert. denied sub nom. Mansell v. Mansell*, ___ U.S. ___, 112 L.Ed.2d 197, 111 S.Ct. 237 (1990) (*Mansell II*).

Ms. Banks agrees with petitioner's list of parties and opinions below.

JURISDICTION

Petitioner seeks review of an unpublished decision of the Court of Appeal of the State of California, Third Appellate District, *In re Marriage of Banks*, C010194, issued on January 31, 1992. Appendix D to Petition for a Writ of Certiorari.[1] The California Supreme Court denied review on April 15, 1992. Appendix E.

The California Court of Appeal affirmed a trial court order filed December 7, 1990, which denied a motion by petitioner John W. Banks to set aside a prior family law judgment dividing property upon dissolution of marriage. That prior judgment, entered on May 4, 1987, was never appealed. The Court of Appeal determined that, under California law, the prior judgment was res judicata.

This Court does not have jurisdiction under 28 U.S.C § 1257 to review this decision. Petitioner wrongly asserts that the issue is whether state courts may violate 38 U.S.C. § 5301 and 10 U.S.C. § 1408(a)(4). Rather, the determinative issue is purely a question of state law: whether California's res judicata law bars reopening a state court family law judgment that was never appealed and has long since become final for all purposes. This Court has no jurisdiction over this matter of pure state law.

[1] All further references to the record are to documents included in the Appendix to the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY AUTHORITY

In addition to the constitutional and statutory provisions cited by petitioner, this case also involves:

28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rule 2(a), California Rules of Court[2]:

> [A] notice of appeal shall be filed within 60 days after the date of mailing notice of entry of judgment by the clerk of the court . . . , or within 60 days after the date of service of written notice of entry of judgment by any party upon the party filing the notice of appeal, or within 180 days after the date of entry of judgment, whichever is earliest, ...

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[2] The language provided for Rule 2(a), California Rules of Court, is that effective January 1, 1986 to January 1, 1990, which is the applicable time period. Effective January 1, 1990, Rule 2(a) was amended in ways insignificant to this appeal. The period in which a notice of appeal may be filed still ends no later than 180 days after the date of entry of judgment.

STATEMENT OF THE CASE

This proceeding began in 1979 when Ms. Banks filed a state court action for dissolution of her marriage of 25 years to petitioner husband. He served in the United States military for 20 years, more than 17 of which were during the marriage. He retired from the military in 1971, and he elected to receive 40 percent of his military retirement as disability pay. Appendix A, pp. 8-9.

On January 2, 1986, the California Superior Court, County of Sacramento, determined that 87.9 percent of husband's military retirement was community property. Under California law then in effect, the portion of the retirement attributable to disability was not viewed as community property. Accordingly, Ms. Banks was awarded a community property interest in the retirement pay remaining after the disability pay was subtracted. Appendix A, p. 9.

In 1986, the California Supreme Court ruled that the community property interest in military retirement pay included disability pay.[3] Ms. Banks moved to reopen the property division to obtain her community interest in husband's disability pay. Under California law, a court may reopen dissolution actions to divide community assets left undivided in earlier proceedings.[4]

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[3] *Casas v. Thompson*, 42 Cal.3d 131, 143-144, 720 P.2d 921, 929, *cert. denied*, 479 U.S. 1012, 93 L.Ed.2d 713, 107 S.Ct. 659 (1986).

[4] *Casas*, 42 Cal.3d at 139, 720 P.2d at 925; *Henn v. Henn*, 26 Cal.3d 323, 330, 605 P.2d 10, 13 (1980).

Her motion was granted. On May 4, 1987, in accordance with California's community property law then in effect, the superior court entered a judgment awarding Ms. Banks her half of the community's interest in husband's gross military retirement pay, including disability pay. Appendix B. Husband never appealed this 1987 judgment. Appendix D, p. 2. Under California law, the last day to appeal occurred no later than 180 days after its entry. Rule 2(a), California Rules of Court. The court's authority to set the judgment aside also ended after six months. California Code of Civil Procedure § 473. The judgment is now final for all purposes.

In 1989, in *Mansell I*, this Court considered whether the federal Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408 (FUSFSPA),[5] which authorizes states to treat military retirement pay as community property, also allows states to include as community property military retirement benefits which are waived in order to receive disability benefits. The Court concluded that "under the Act's plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been

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[5] FUSFSPA was enacted in response to *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 (1981). *McCarty* held that the federal scheme of military retirement benefits preempted state community property laws because "the application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation." *Id.*, 453 U.S. at 223, 69 L.Ed.2d at 600, 101 S.Ct. at 2736. In FUSFSPA, "Congress sought to change the legal landscape created by the *McCarty* decision." *Mansell I*, 490 U.S. at 587, 104 L.Ed.2d at 684, 109 S.Ct. at 2028.

granted the authority to treat total retired pay as community property." *Mansell I*, 490 U.S. at 589, 104 L.Ed.2d at 685, 109 S.Ct. at 2028.

In 1990, both parties filed motions in state superior court in connection with the 1987 judgment. Petitioner had refused to comply with the judgment, and Ms. Banks sought an order allowing her to collect arrearages by levying on a settlement he received in an unrelated action. Petitioner asserted that the 1987 judgment should be set aside based on *Mansell I*, claiming that the judgment was void for lack of subject matter jurisdiction. Ms. Banks opposed on the ground that his motion was barred by California's res judicata law. Appendix D, pp. 2-3.

By an order dated December 7, 1990, the superior court denied petitioner's belated attack on the 1987 judgment, and granted Ms. Banks's motion to enforce. Appendix C.

Petitioner appealed this order, the California Court of Appeal affirmed in an unpublished decision, and the California Supreme Court declined to review. Although *Mansell I* made it clear that federal law precludes states from treating military disability pay as community property, and the 1987 judgment was erroneous in applying state community property law to the military disability pay, the state court's error in selecting the applicable law did not mean that its 1987 judgment was void. State courts still have subject matter jurisdiction to divide and distribute property upon dissolution of marriage. The 1987 judgment, though wrong, was within the court's subject matter jurisdiction; since it was not timely appealed, it is now res judicata. Appendix D.

The court of appeal also rejected husband's claim that the anti-attachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301, made the judgment void. "No claim is made that the order here seeks to levy upon disability pay." Appendix D, p. 7.

Since the 1987 judgment is not void for lack of subject matter jurisdiction, the appellate court affirmed the order denying petitioner's 1990 motion to set that judgment aside. Appendix D, p. 1.

SUMMARY OF ARGUMENT

This marital dissolution case presents only state law issues arising under California's law of res judicata, over which this Court has no jurisdiction. The question decided by the California Court of Appeal had nothing to do with interpreting federal law or the correctness of the 1987 judgment in applying that law. The only issue was whether, in 1990, the trial court properly applied the state res judicata law to deny petitioner's motion to reopen the 1987 judgment.

Although the 1987 judgment wrongly construed federal law, that decision, now long since final, was a judgment the state court had subject matter jurisdiction to enter. The 1987 judgment merely distributed property upon dissolution of marriage. The fact that federal law should have been applied in distributing veterans' disability pay does not mean that the state court lacked jurisdiction. The power to decide includes the power to decide wrongly, and, under California law, which is consistent with the principles announced by this Court, a

judgment that is final and not appealed is res judicata, even though it was wrongly decided.

There is no issue here as to violation of the anti-attachment provisions of the Veterans' Benefits Act, 38 U.S.C. § 5301. Ms. Banks does not seek to attach petitioner's military benefits, and no state court has ever purported to authorize any such attachment in this case. The only attachment involved is of an unrelated settlement petitioner received.

The case has no significant impact. Indeed, it has no legal effect at all except as to the parties involved. The decision is unpublished, may not be cited, and is of absolutely no precedential value. Even if its reasoning were to be adopted in other cases, it would affect, at most, only a few recalcitrant spouses who, like petitioner, ignore state court family law judgments until long after the time to appeal or otherwise attack them has passed and the judgments have become final and binding for all purposes.

There is no reason for this Court to exercise its discretionary power to review the state court decision in this case.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO REVIEW THIS CASE SINCE NO FEDERAL QUESTIONS ARE RAISED

A. THIS COURT HAS NO JURISDICTION TO REVIEW STATE COURT DETERMINATIONS OF STATE LAW QUESTIONS, INCLUDING THE RES JUDICATA EFFECT OF A STATE COURT JUDGMENT

An unbending rule of this nation's judicial system is that the jurisdiction of this Court does not include the power to review state court decisions on questions of state law. This principle is now spelled out in 28 U.S.C. § 1257(a), which grants this Court authority to review state court decisions which are claimed to be "repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."[6]

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[6] Petitioner mistakenly invokes this Court's jurisdiction under former 28 U.S.C. § 1257(3). Four years ago, § 1257 was amended so that former paragraphs (1) and (2), authorizing appeals of state court decisions, were deleted. Former paragraph (3), unchanged, became paragraph (a) in revised § 1257, so that certiorari is now the only available means for cases from state courts to reach this Court. Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

A case decided by this Court over a hundred years ago described this principle and applied it to circumstances like the present case. In *Chouteau v. Maffit*, 111 U.S. 200, 28 L.Ed. 400, 4 S.Ct. 340 (1884), this Court was asked to review a state court decision giving res judicata effect to a prior state court judgment, thereby precluding the appellant from asserting a federal law issue. This Court dismissed the appeal even though the appellant sought to raise a federal issue, because the state court had sustained the res judicata defense without reaching the federal question, saying:

> [I]t is clear we have no jurisdiction. The legal effect of the judgment set up in bar is a question of general law as to which the decision of the state court is not reviewable here. The federal questions, if any there were in the case, lay behind this defense and could not be reached until it was out of the way. The question presented by the defense was not whether a federal right had been properly denied by a judgment, but whether the right had been once judicially determined so as to become *res judicata* between the parties. . . . It is apparent, therefore, that no federal question which there may have been in the case was decided by the state court, and that the decision of such a question was not necessary to the final decree rendered. *Without determining whether, if the former judgment had not been a bar to the action, there were questions in the case that might have given us jurisdiction, we grant the motion to dismiss.*

Id., 111 U.S. at 201, 28 L.Ed. at 401, 4 S.Ct. at 340-341 (emphasis by Court).

Similarly, in *San Francisco v. Itsell*, 133 U.S. 65, 33 L.Ed. 570, 10 S.Ct. 241 (1890), this Court dismissed review of a decision of the California Supreme Court which rested on state res judicata law, holding:

> This court has no jurisdiction to review a judgment of the highest court of a State, unless a federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiff in error.

Id., 133 U.S. at 66, 33 L.Ed. at 571, 10 S.Ct. at 242.

The California Supreme Court had held that a prior judgment concerning a title dispute, which had not been reversed, barred a later ejectment action because the earlier decision was res judicata under state law and was therefore "conclusive of this branch of the case." *San Francisco v. Itsell*, 80 Cal. 57, 60, 22 P. 74, 75 (1889), *appeal dism.* 133 U.S. 65, 33 L.Ed. 570, 10 S.Ct. 241 (1890).

In dismissing the appeal, this Court noted that the only issue decided by the California Supreme Court was "the issue whether the former judgment . . . was a bar to this action." *San Francisco v. Itsell*, 133 U.S. at 66, 33 L.Ed. at 571, 10 S.Ct. at 242. The appeal was dismissed because the issue of the res judicata effect of the prior judgment was not within this Court's jurisdiction to review. "That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States." *Id. See also Northern Pac. R. Co. v. Ellis*, 144 U.S. 458, 462, 36 L.Ed. 504, 506, 12 S.Ct. 724, 726 (1892); *Adams v. Louisiana Bd. of Liquidation*, 144 U.S. 651, 653, 36 L.Ed. 578, 579, 12 S.Ct. 756, 757 (1892); *Beals v. Cone*, 188 U.S. 184, 188, 47 L.Ed. 435, 438, 23 S.Ct. 275, 278 (1903).

These cases are the basis for the statement in *Mansell I* that:

> Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction.

Mansell I, 490 U.S. at 586 n.5, 104 L.Ed.2d at 684 n.5, 109 S.Ct. at 2027 n.5.

In *Mansell I*, as here, a husband had attempted, after several years, to reopen a California family law judgment that treated his military disability pay as community property, arguing that federal law precluded application of the state community property law.[7] This Court's decision in *Mansell I* was limited to that federal question, leaving it entirely to the California courts to determine whether, under state law, res judicata prevented the husband from asserting federal claims after the prior judgment had become final for all purposes.

On remand, the state appellate court held that California res judicata law did bar the husband from reopening the old judgment, even though that judgment was erroneous. "[U]nder California law, there was, and is, no basis to reopen the settlement and reach the federal question." *Mansell II*, 217 Cal.App.3d at 235, 265 Cal.Rptr. at 236. This Court denied certiorari. *Mansell v. Mansell*, ___ U.S. ___, 112 L.Ed.2d 197, 111 S.Ct. 237 (1990).

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[7] In *Mansell I*, the husband claimed the prior judgment was erroneous under *McCarty*, just as petitioner here argues that the 1987 judgment in this case is erroneous under *Mansell I*.

The present case is *Mansell II* once again. Like *Mansell II*, it only involves the question this Court left for state courts to answer in *Mansell I*: whether res judicata, as applied in California, prevents petitioner from attempting to reopen the prior state court property division judgment, which had become final for all purposes.

Mansell II makes clear that under California law, unless a judgment within the court's subject matter jurisdiction is reversed after timely appeal or appellate writ, the judgment is valid and conclusive, even if erroneous. Quoting *Estate of Gardiner*, 45 Cal.App.2d 559, 563, 114 P.2d 643, 645 (1941), the court stated:

> An erroneous decree which is not void on its face is forever binding and conclusive upon the parties named, upon the status defined, or upon the property described, unless upon motion seasonably made it be vacated or upon appeal it be reversed.¶ . . . The fact that a court shall decide erroneously does not affect the validity or the finality of a judgment any more than to decide correctly. . . . Its jurisdiction is not defeated or limited by a wrong decision.

Mansell II, 217 Cal.App.3d at 230, 265 Cal.Rptr. at 233.

Even though the 1987 judgment violated FUSFSPA, as this court later ruled in *Mansell I*, that does not make the judgment void. Under California law, "[A] final judgment or order is res judicata even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties." *Moffat v. Moffat*, 27 Cal.3d 645, 655-656, 612 P.2d 967, 973 (1980), quoting *Pacific Mut. Life Ins. Co. v. McConnell*, 44 Cal.2d 715, 725, 285 P.2d 636, 641 (1955), *appeal dism.* and

cert. denied, 350 U.S. 852, 100 L.Ed. 852, 76 S.Ct. 472 (1956). *See also Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control*, 55 Cal.2d 728, 731, 361 P.2d 712, 714 (1961); and *Slater v. Blackwood*, 15 Cal.3d 791, 797, 543 P.2d 593, 596 (1975).

California follows the same rule as federal courts: the doctrine of res judicata precludes the readjudication of all matters, including jurisdictional issues, which were or might have been previously litigated between the same parties. As explained in *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 84 L.Ed. 329, 333, 60 S.Ct. 317, 319 (1940), federal courts have "authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally."

A strong and obvious interest exists in protecting courts and litigants from endless litigation. *Slater*, 15 Cal.3d at 797, 543 P.2d at 596.

> It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined.

Stoll v. Gottlieb, 305 U.S. 165, 172, 83 L.Ed 104, 109, 59 S.Ct. 134, 138 (1938). This policy is particularly compelling in the area of family law, where the acrimony of

failed relationships may cause parties to prolong the judicial process needlessly.

State courts also have a compelling interest in definitively resolving family law issues, which have always been "preeminently matters of state law." *Mansell I*, 490 U.S. at 587, 104 L.Ed.2d at 684, 109 S.Ct. at 2027.

Both these interests are best served by allowing state courts to determine when property disputes which spouses bring to the state courts are finally resolved. Here, the state appellate court concluded that, whether or not the prior judgment was correct, husband's 1990 motion to set aside that judgment so he could reopen and prolong litigation over the distribution of property was properly denied. The 1987 judgment which he never appealed was res judicata. This is a state law determination that is not subject to review in this Court.

B. FEDERAL LAW PREEMPTS STATE COMMUNITY PROPERTY LAW, BUT DOES NOT DEPRIVE STATE COURTS OF JURISDICTION TO DIVIDE PROPERTY

Husband claims that the 1987 judgment was not merely incorrect, but was void. He argues that since federal law, and not state law, governs the characterization of the military disability pay as separate or community property, federal courts have exclusive jurisdiction as to this issue. "This contention, if true, would be a proper basis for attacking the judgment." *Mansell II*, 217 Cal.App.3d at 227, 265 Cal.Rptr. at 231.

However, his premise is false. Nothing in FUSFSPA or anywhere else in federal law grants federal courts any jurisdiction to distribute property upon dissolution of marriage. Petitioner cites no authority for any federal court jurisdiction, exclusive or otherwise, to distribute property between divorcing spouses, and family law disputes, including disposition of marital property, remain a quintessential matter of state court jurisdiction.

The state appellate court correctly determined that the judgment was not void. The court relied upon *Mansell II*, which rejected the same argument and concluded that *McCarty* and *Mansell I* did not hold that federal law divested state courts of jurisdiction to divide military retirement benefits; those decisions only require state courts to apply federal law in characterizing military retirement benefits as community or separate property. *Mansell II*, 217 Cal.App.3d at 228, 265 Cal.Rptr. at 231.

The obligation of state courts to apply federal law, and not state law, to the division of retirement benefits certainly does not imply a preemption of all state court jurisdiction. *Mansell II*, as well as *In re Marriage of Thomas*, 156 Cal.App.3d 631, 636, 203 Cal.Rptr. 58, 59 (1984), distinguishes between federal law preemption of state law, which merely requires state courts to apply federal law and does not divest them of jurisdiction, and subject matter preemption, where federal law deprives state courts of all power to act.

As the court below explained, where, as here, preemption is based on a conflict between state and federal law, "the ordinary rule is that a judgment rendered based upon the lesser law preempted by the conflict is not void

and may not be collaterally challenged on the ground of lack of jurisdiction." Appendix D, p. 4. Under California law, "it is well settled that erroneous final judgments serve as a bar to further litigation on the action, whereas in general void judgments may be collaterally attacked." *Moffat*, 27 Cal.3d at 654, 612 P.2d at 972.

Nothing in FUSFSPA, *McCarty*, or *Mansell I*, indicates that federal law divests state courts of all subject matter jurisdiction over military retirement benefits. *Mansell II*, 217 Cal.App.3d at 228, 265 Cal.Rptr. at 232. To the contrary, FUSFSPA expressly recognizes that state courts have the authority to distribute property upon dissolution of marriage, and authorizes state courts to apply state community property law in dividing disposable military retirement pay. 10 U.S.C. § 1408(c)(1).[8] The Act clearly anticipates that in marital dissolution cases state courts will continue to divide military retirement pay between divorcing spouses, so long as divisions are made in compliance with federal law. For example, FUSFSPA creates a mechanism under which the federal government

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[8] Petitioner relies upon *In re Marriage of Curtis*, 7 Cal.App.4th 1, ___ Cal.Rptr. ___ (1992), to support his argument that FUSFSPA actually deprives state courts of all jurisdiction. In fact, this decision holds exactly the contrary. Quoting *Mansell II*, 217 Cal.App.3d at 228, 265 Cal.Rptr. at 231, the court said: "The holding in *McCarty* that federal law preempted state law in this area simply meant that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of jurisdiction." *Curtis*, 7 Cal.App.4th at 11. *Curtis* merely held that the 1990 amendments to FUSFSPA make it clear that a state court is not to apply FUSFSPA retroactively.

will make direct payments to a former spouse who presents to the Secretary of the relevant military service a state court order granting him or her a portion of the military retiree's disposable retired pay. 10 U.S.C. § 1408(d)(1).

Similarly, this Court's decisions assume that state courts will continue to exercise subject matter jurisdiction in dissolution cases to divide marital property and confirm separate property. *Mansell I* stated that, if California law permits, the state court could "reopen the settlement and reach the federal question." *Id.*, 490 U.S. at 586 n.5, 104 L.Ed.2d at 684 n.5, 109 S.Ct. at 2027 n.5. This statement clearly implies that state courts do have the power to decide federal law issues.

McCarty involved a direct appeal of a state court judgment treating military retirement pay as community property upon dissolution of marriage, rather than confirming the benefits to the husband as his separate property. After holding that the state court erred in applying state community property law to military retirement pay, this Court reversed and "remanded for further proceedings not inconsistent with this opinion." *Id.*, 453 U.S. at 236, 69 L.Ed.2d at 608, 101 S.Ct. at 2743. Implicit in this remand order is the jurisdiction of the state court to award the veterans' pay in accordance with federal law.

While federal law determines whether or not veterans' benefits are subject to state community property laws, and, in particular, may preempt states from treating military disability pay as community property, nothing in federal law evidences any intent to deprive state courts of their traditional authority and subject matter jurisdiction

law merely requires state courts to divide military retirement benefits in accordance with FUSFSPA.

A state court's misreading of federal law as to what military benefits are subject to division between spouses under state community property law may be judicial error. It is not, however, an act in excess of the court's subject matter jurisdiction.

C. THIS CASE INVOLVES NO ATTACHMENT, LEVY OR SEIZURE PROHIBITED BY 38 U.S.C. § 5301

Husband attempts to create jurisdiction under 28 U.S.C. § 1257 by invoking, in his question presented for review, the anti-attachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301. This statute prohibits any levy on veterans' payments due from the Veterans' Administration (now the Department of Veterans Affairs).[9] However, husband's suggestion that this case raises any issue as to attachment of veterans' pay is a mischaracterization of the facts in this case.

The 1987 judgment simply orders husband to pay Ms. Banks her share of the community property, including his gross military retirement pay, and to request the military to provide a monthly statement of the amount of his total retirement pay. Appendix B. The judgment in no way

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[9] Under 38 U.S.C. § 5301(a), payments due veterans under the Veterans' Benefits Act "shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever."

attempts to make his veteran's benefits "liable to attachment, levy, or seizure by or under any legal or equitable process whatever," as § 5301 prohibits.

The only levy in this case occurred in the December 7, 1990 order, and has nothing at all to do with veterans' pay. The court authorized Ms. Banks to attach husband's settlement of his claims against the State of California, claims which are wholly unrelated to veterans' pay. Appendix C.

In *Mansell I*, the majority of this Court found it unnecessary to decide whether the anti-attachment clause of the Veterans' Benefits Act separately precludes states from treating veterans' disability pay as community property. *Id.*, 490 U.S. at 587 n.6, 104 L.Ed.2d at 684 n.6, 109 S.Ct. at 2027 n.6. However the majority opinion did refer to *Rose v. Rose*, 481 U.S. 619, 95 L.Ed.2d 599, 107 S.Ct. 2029 (1987), a decision which held that a state court had jurisdiction to hold a veteran in contempt for failure to pay a child support obligation even though the veteran's only income was veterans' benefits. In *Rose*, the Court explained that this method of enforcing the veteran's obligation was not preempted by the anti-attachment provision.

> The contempt proceeding did not turn the Administrator into a collection agency; the Administrator was not obliged to participate in the proceeding or to pay benefits directly to appellee.

Id., 481 U.S. at 630, 95 L.Ed.2d at 610, 107 S.Ct. at 2036.

The *Mansell I* majority also referred to *Wissner v. Wissner*, 338 U.S. 655, 94 L.Ed. 424, 70 S.Ct. 398 (1950), a

case in which the anti-attachment provision was applied to preempt a state from literally seizing the payments due under a veteran's insurance policy as payment of a wife's share of community property. The present case, unlike *Wissner*, involves absolutely no seizure of veterans' benefits.

Justice O'Connor, joined by Justice Blackmun, who dissented in *Mansell I*, would have reached the anti-attachment issue. They flatly rejected any claim that a community property interest in retirement pay could not be recovered out of income or assets separate from the veterans' benefits themselves.

> To recognize that § 3101(a) [now § 5301(a)] protects the funds from a specific source, however, does not mean that § 3101(a) prevents Gaye Mansell from recovering her 50 percent interest in Major Mansell's gross retirement pay out of any income or assets he may have *other* than his veterans' disability benefits.

Id., 490 U.S. at 603, 104 L.Ed.2d at 694, 109 S.Ct. at 2036.

Since there is no question now before the Court as to whether veterans' benefits can be attached, husband may not, based on mere conjecture that attachment may be attempted at some future time, elevate this purely hypothetical issue into a basis supporting jurisdiction.

II.

THIS COURT NEED NOT EXERCISE ITS DISCRETIONARY POWER TO REVIEW AN UNPUBLISHED DECISION WITH NO PRECEDENTIAL VALUE

Even if this Court had jurisdiction, this is not a case worthy of the Court's attention. The state court opinion

under review is unpublished, and under California law, it is not to be relied upon or cited in other cases.[10] The opinion has no effect whatsoever beyond the present case.

Even if the opinion could be cited as precedent, its facts will not be repeated. *Mansell I* is definitive: state courts may no longer treat veterans' disability pay as community property.[11] The 1987 judgment petitioner seeks to reopen was decided two years prior to *Mansell I*. There is absolutely no suggestion that future state court decisions will not properly apply FUSFSPA as interpreted in *Mansell I*.

This Court's review by certiorari is a matter of discretion. *Hicks v. Miranda*, 422 U.S. 332, 344, 45 L.Ed.2d 223, 236, 95 S.Ct. 2281, 2289 (1975). In 1988, when 28 U.S.C. § 1257 was amended, all avenues to appeal state court decisions to this Court were eliminated, and the only remaining means of review is by petition for certiorari. Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). As explained in the commentary to the revised § 1257, this change

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[10] Under the California Rules of Court, Rule 977(a), an unpublished opinion "shall not be cited or relied on by a court or a party in any other action or proceeding," except for purposes of res judicata, collateral estoppel or law of the case, or when the opinion is relevant to a criminal or disciplinary proceeding.

[11] *Mansell I*, decided May 30, 1989, effectively reversed *Casas v. Thompson*, decided by the California Supreme Court on July 21, 1986, with certiorari denied on December 8, 1986. At most, only those few cases decided within the intervening period in reliance on *Casas* could share in the error as to federal law which occurred in the 1987 judgment here.

removed any mandatory jurisdiction this Court had to review state court decisions, and instead gives the Court the discretion to decide in each case whether review of a state court decision is worthy of the Court's time and energy. "The certiorari route is discretionary: in effect, it's a petition for permission to appeal. The Court grants the petition only if it finds that the case presents issues that warrant its attention." David D. Siegel, *Commentary on 1988 Revision*, 28 U.S.C.A. § 1257 (West Supp. 1992) at 42.

The state court decision petitioner asks this Court to review merely adopts the reasoning of a prior decision, *Mansell II*. The refusal to reopen the judgment in *Mansell II* rests on the exact same principles of state res judicata law that the court applied in this case. This Court has already denied review of *Mansell II*. *Mansell v. Mansell*, ___ U.S.___, 112 L.Ed.2d 197, 111 S.Ct. 237 (1990). Review should also be denied here.

CONCLUSION

For these reasons, respondent Verna J. Banks respectfully requests the Court to deny the petition for writ of certiorari, either for lack of jurisdiction or under the Court's discretion to reject review of insignificant cases.

The res judicata effect of a state court family law judgment is purely a matter of state law, which federal courts have no jurisdiction to review. No federal issue is raised in this case, and petitioner's attempt to manufacture a purely conjectural federal question is unsupported by the record.

Even if review were possible, it is unnecessary. The opinion of the Court of Appeal, which is unpublished, has no precedential value, and this Court's decision in *Mansell I*, after the erroneous 1987 judgment was entered, means that this error as to federal law will not recur.

The petition for writ of certiorari should be denied.

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